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Appeals Ruling, Dissents on Post's Series on Vietnam

Following is the text of the majority opinion of seven judges on the U.S. Court of Appeals for the District of Columbia affirming the decision of U.S. District Court Judge Gerhard Gesell in The Washington Post case:

This is an appeal by the United States from an order of the district court denying a preliminary injunction against the publication of material derived from a document entitled "History of U.S. Decision-Making Process on Vietnam Policy." We affirm the district court.

The district court denied the preliminary injunction after a hearing. By affidavits and the testimony of witnesses at the hearing the government attempted to demonstrate that the publication of the material in question should be restrained because it would gravely prejudice the defense interests of the United States or result in irreparable injury to the United States. The district court found that the government failed to sustain its burden. Specifically, the district court directed the government to present any document from the "History" the disclosure of which in the government's judgment would irreparably harm the United States. The government's affidavits and testimony, presented largely in camera, discussed several of the documents. The district court found either that disclosure of those specific documents would not be harmful or that any harm resulting from disclosure would be insufficient to over-ride First Amendment interests. Having examined the record made before the district court we agree with its conclusion. In our opinion the government's proof, judged by the standard suggested in Near v. Minnesota, 283 U.S. 697, 716 (1931), does not justify an injunction.

The vitality of the principle, that any prior restraint on publication comes into court under a heavy presumption against its constitutional validity, was recognized by the Supreme Court of the United States as recently as May 17, 1971. Organization for a Better Austin v. Keefe, No. 135, October Term 1970, 39 L.W. 4577.

Our conclusion to affirm the denial of injunctive relief is fortified by the consideration that the massive character of the "leak" which has occurred, and the disclosures already made by several newspapers, raise substantial doubt that effective relief of the kind sought by the government can be provided by the judiciary.

The government has requested a stay in order that it may present this matter to the Supreme Court of the United States. Accordingly, the stay previously entered is continued until 6:00 p.m., Friday, June 25, 1971.

Affirmed

Following is the text of Appeals Court Judge George E. MacKinnon's dissent:

It is unfortunate that this case comes to us on a blind record in which the actual documents in the possession of the newspaper are not before us. Our ability to deal effectively with the problem is also currently complicated today by the release of the entire 47 volumes to Congress where the problem of disclosure may be compounded. This and the widespread disclosure heretofore made, would minimize the value of any restraining order. However, by agreement of the parties some of the documents will be protected, and an examination of some of the other documents convinces me that we should not entirely fail to protect the security of our nation's military and diplomatic activities even though the ability of any court to act effectively is greatly impaired by the present climate of disclosure. Since we must pass on some phases of the matter, at the very least I would remand to the District Court for a more precise ruling by the trial court as to several specific documents. I would not reward the theft of these documents by a complete declassification. There is a regular method by which access to classified information can be accomplished and in my view the prescribed method should be followed in this as in other instances. As this case well illustrates, courts are not designed to deal adequately with national defense and foreign policy. Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 96 (1970).

Following is the text of Appeals Court Judge Malcolm R. Wilkey's dissent:

I would affirm the action of the trial court in not restraining the publication of the vast majority of these documents, but I must dissent from the blanket, total affirmance of the trial court's action, without a remand for a particularized finding as to the likelihood of harm resulting from the publication of certain specific papers.

We all take pride in freedom of speech and the press as one of the true glories of our form of government, perhaps most eloquently apotheosized by Judge Learned Hand, "To many this is, and always will be, folly; but we have staked upon it our all."* This sets an ideal reference point, but Judge Hand, when he uttered those words, was not adjudicating this particular case. Of more relevance to the case at bar are the words of Justice Holmes: "The character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."** To which Justice Frankfurter added: "Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights."***

In the desire to minimize the prior restraint of publication in the stay orders, the compression of time severely handicapped the parties, the trial court and this court in focusing on the few specific documents whose publication presently constitute a clear danger. The Government did not know which documents out of the 47 volumes The Post had in its possession until a partial list was furnished the night before the second hearing before the trial court, a supplemental list was furnished in the middle of the hearing, and not until the Government had time to check the Post description of each document against the 47 volumes was the Government in a position to say whether in its opinion publication would be dangerous or not. The obvious clarifying solution of The Post physically producing the documents in its possession was barred by The Post's objection, sustained by the trial court, that its source would be revealed.

In this state of affairs the Government necessarily relied on affidavits couched in general terms, two dated before and one on the day of the hearing. These and the cross-examination of two affiants on the material in the

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affidavits did not satisfy the trial court with the requisite specificity as to the clear danger that publication of any single document presently represented. On this state of the record the court here sustains the trial court, saying that the Government did not sustain its admittedly heavy burden of proof to justify a prior restraint on publication.

We have not been furnished any of the original documents. But on careful detailed study of the affidavits in evidence, I find a number of examples of documents which, if in the possession of the Post and if published, could clearly result in great harm to the nation. When I say "harm," I mean the struction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate as honest brokers between would-be belligerents.

The court's opinion relies upon the standard of Near v Minnesota in regard to prior restraint. So do I. Near cites "the publication of sailing dates of transports or the number and location of troops" **** as obvious examples where prior restraint of publication would be justified. In the affidavit evidence before the trial court and this court there are examples cited which meet this standard. There appears to be a clear and present danger of military casualties enhanced. There are numerous examples of the likely destruction of our diplomatic efforts, and this should not be put on a lower scale than immediate prospective military losses.

Only those who think of the settlement of international disputes by sheer military power would derogate the importance of diplomatic negotiations as our first line of defense. It is literally true that when diplomacy fails lives are lost.

Of course the great bulk of these documents probably may be characterized as only embarrassing, some not even that, and are ready for study by journalists, historians and the public; the public should have them. Yet the small percentage which appear dangerous could be greviously harmful to this country.

Since neither we nor the trial court had before it the individual documents, and the trial court dealt only in generalities, because that was necessarily the Government's case, I would remand this case to the trial court for the Government, first, now that it has the Post['s] complete list and has had the time to check the list against the 47 volumes, to say which documents it objects to having published. This, in my judgment, will immediately release the great bulk of these for publication. (If it doesn't, the Government is relying on the wrong standard.) Next, the Government can pinpoint its objections to each of the remaining documents. On the basis of what we heard in oral argument, The Post might agree that some would not be published, leaving a remainder on which it differs with the Government. On the remainder the trial court can then rule, applying the Near standard, but this time knowing to which specific document the standard is to be applied.

*United States v. Associated Press, 52 F. Supp. 362, 372 (S.D. N. Y. 1943).
**Schenck v United States, 249 U.S. 47, 52 (1919).
***Bridges v. California, 314 U., 252, 282 (1941).
****Near v. Minnesota, 283 U.S. 697, 716 (1930).